A

GOLDEN SCREEN CINEMA SDN BHD

v.

MTM REALTY SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEALS NOS: W-02-665-2007 & W-02-1147-2007]

C

22 APRIL 2008

CIVIL PROCEDURE: *Injunction - Injunction to prevent sale of property - Delay - Delay of 19 months - Whether justified and understandable - Whether property had special value - Claim of bona fide*

D *purchaser - Claim seriously disputed - Whether appropriate to leave it to trial - Whether plaintiff entitled to relief*

The plaintiff is the tenant of the foyer at two cinemas ('the property') owned by the first defendant in a shopping complex

E known as Sungei Wang Plaza, Kuala Lumpur. The tenancy the plaintiff had with the first defendant contained a clause giving it a right of first refusal in the event that the first defendant intended to sell the property. The first defendant sought to dispose off the property, and in the circumstances, by letter dated 17 May 2004,

F offered to sell it to the plaintiff for RM16 million. Disputes however arose as to the purport and effect of para. 2(b) of the letter of offer, ie. pertaining to the parties' undertaking to execute a formal sale and purchase agreement within 7 days after the owner of Sungei Wang Plaza approved the intended change in the

G use of the property – and the disputes not being resolved, on 28 December 2005, the first defendant terminated the agreement and sold the property to the second defendant instead. On 14 August 2007 the plaintiff took out a writ and simultaneously by summons moved for an injunction against the defendants, which application

H was granted by the learned judge on 6 December 2007. The defendants appealed and argued that injunctive relief ought to be refused as: (i) there was an inordinate delay in seeking the injunction (19 months); (ii) there was nothing special about the property and that the presumption under s. 11(2), Specific Relief

I Act 1950, had been rebutted; (iii) the learned judge had overlooked the fact that the obligation was upon the plaintiff to obtain approval from the owner of Sungei Wang Plaza for the

works it intended to carry out; and (iv) the second defendant was a *bona fide* purchaser and ought to be allowed to conclude the purchase of the property.

Held (dismissing the appeal):
Per Gopal Sri Ram JCA delivering the judgment of the court

(1) There was nothing improper in the exercise of discretion by the trial judge in not considering the delay to be of such a nature as to disentitle the plaintiff to the relief sought. It would be quite unreasonable to expect the plaintiff as the tenant of first defendant to rush off to court the moment the contract was terminated. It had an ongoing relationship with the first defendant. It is a commercial reality that businessmen do not wish to create an antagonist relationship in circumstances where there are negotiations on foot for a transaction. One can therefore readily understand, as the learned judge did, the plaintiff's reluctance to commence action earlier than it did. And it must be said that soon after it discovered the sale of the subject property to the second defendant it did move swiftly enough to protect its interests. (para 6)

(2) There was no merit in arguments (ii) and (iii) herein. By reason of its location and its popularity with the general public, the building in which the subject property is located itself carries a special value. So must the subject property. Indeed, having regard to the special circumstances of this case, the subject property is indeed of special value. Likewise, the evidence discloses that the plaintiff did in fact write to the owners. They in turn instructed their solicitors to reply by letter to the first defendant. (paras 7 & 8)

(3) So far as the second defendant is concerned, the allegation that it is a *bona fide* purchaser and is therefore not to be prevented from going ahead with its purchase is a matter that is in serious dispute. There is some evidence to show that the second defendant was in fact aware of the transaction between the plaintiff and the first defendant. In any event the burden is on the second defendant to prove that it was indeed a *bona fide* purchaser and this is a matter that is best left to be resolved at a trial in which *viva voce* evidence is led. (para 9)

(4) A reasonable tribunal properly directing itself on the law and upon the material available would have come to the same conclusion as the learned judge and would have exercised discretion in like manner. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif adalah penyewa bagi ruang tiba di dua panggung wayang ('hartanah') yang dimiliki oleh defendan pertama yang terletak di sebuah kompleks belibelah bernama Sungei Wang Plaza, Kuala Lumpur. Perjanjian tenansi yang dimeterai plaintif dengan defendan pertama mengandungi fasal yang memberikan plaintif hak pertama untuk menolak jika defendan pertama berhasrat untuk menjual hartanah. Defendan pertama memutuskan untuk menjual hartanah, dan berikutan itu, melalui surat bertarikh 17 Mei 2004, telah menawarkan untuk menjualkannya kepada plaintif dengan harga RM16 juta. Pertikaian bagaimanapun berbangkit mengenai maksud sebenar perenggan 2(b) surat tawaran, iaitu mengenai kesanggupan pihak-pihak untuk memeterai perjanjian jual beli dalam tempoh 7 hari selepas pemilik Sungei Wang Plaza meluluskan perubahan penggunaan hartanah oleh plaintif – dan disebabkan pertikaian gagal diselesaikan, maka pada 28 Disember 2005 defendan pertama menamatkan perjanjian dan menjual hartanah kepada defendan kedua. Pada 14 Ogos 2007, plaintif memulakan tindakan writ serta saman memohon perintah injunksi terhadap defendan-defendan, permohonan mana telah dibenarkan oleh yang arif hakim pada 6 Disember 2007. Defendan-defendan merayu dan berhujah bahawa relif injunktif harus ditolak oleh kerana: (i) terdapat kelengahan melampau dalam memohon injunksi (19 bulan); (ii) tiada apa-apa yang istimewa mengenai hartanah dan anggapan di bawah s. 11(2) Akta Relif Spesifik 1950 telah berjaya disangkal; (iii) yang arif hakim terlepas pandang fakta bahawa obligasi adalah atas plaintif untuk mendapat kelulusan dari pemilik Sungei Wang Plaza bagi kerja-kerja yang hendak dilakukannya; dan (iv) defendan kedua adalah pembeli *bona fide* dan harus dibenar menyempurnakan pembelian hartanah tersebut.

Diputuskan (menolak rayuan):
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah

(1) Tiada apapun yang tidak wajar mengenai pelaksanaan budibicara oleh hakim bicara yang tidak menganggap kelengahan sebagai sesuatu yang terlalu lewat sehingga boleh

menjejaskan hak plaintif untuk mendapatkan remedi. Adalah agak tidak munasabah untuk menuntut dari plaintif selaku penyewa untuk berkejar terus ke mahkamah sebaik sahaja kontrak ditamatkan. Plaintif mempunyai satu hubungan yang masih berjalan dengan defendan pertama. Adalah satu realiti komersial bahawa ahli-ahli perniagaan tidak cenderung untuk menyebabkan kekeruhan pada keadaan jika sesuatu transaksi itu masih dalam perundingan. Ianya dengan itu dapat difahami, seperti yang difahami yang arif hakim, mengapa plaintif enggan memulakan tindakan lebih awal dari yang dibuatnya. Harus juga diingat bahawa sebaik sahaja ia mengetahui mengenai penjualan hartanah kepada defendan kedua, plaintif bergerak dengan pantas untuk melindungi haknya.

(2) Hujah (ii) dan (iii) di sini tidak bermerit. Berdasarkan lokasi dan kedudukannya serta popularitinya, bangunan di mana terletaknya hartanah mempunyai nilainya yang tersendiri. Maka begitu jugalah halnya dengan hartanah. Malah, mengambilkira halkeadaan istimewa kes di sini, hartanah mempunyai nilai yang teristimewa. Begitu juga, keterangan menunjukkan bahawa plaintif telah pun menulis kepada pemilik bangunan. Dan sebagai jawapannya, pemilik-pemilik tersebut telah mengarahkan peguamcara-peguamcara mereka untuk menulis kepada defendan pertama.

(3) Setakat yang berkaitan dengan defendan kedua, pengataan bahawa ia adalah pembeli *bona fide* dan kerana itu tidak harus dihalang dari meneruskan pembelian adalah satu perkara yang dipertikaikan dengan seriusnya. Terdapat beberapa keterangan yang menunjukkan bahawa defendan kedua sebenarnya sedar tentang transaksi di antara plaintif dan defendan pertama. Walau apapun, beban adalah di atas defendan kedua untuk membuktikan bahawa ia adalah sebenarnya seorang pembeli *bona fide* dan persoalan tersebut sebaik-baiknya harus diputuskan di perbicaraan di mana keterangan *viva voce* boleh didengar.

(4) Sebuah tribunal yang munasabah berbekalkan arahan undang-undang yang betul dan berdasarkan fakta yang ada akan mencapai rumusan yang sama seperti yang dicapai oleh yang arif hakim dan akan melaksanakan budibicara dengan cara yang sama.

Case(s) referred to:
Bhup Narain Singh v. Gokhul Chand Mahton LR 61 IA 115 ***(refd)***
Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1979] 1 LNS 19 HC ***(refd)***

Legislation referred to:
Specific Relief Act 1950, s. 11(2)

(Civil Appeal No: W-02-665-2007)
For the appellant - Brendan Siva (Aida Heryani with him); M/s Kadir Andri & Partners
For the respondent - Gideon Tan; M/s Gideon Tan Razali Zaini

(Civil Appeal No: W-02-1147-2007)
For the appellant - BC Poh; M/s TC Chong & Rakan-Rakan
For the respondent - Gideon Tan; M/s Gideon Tan Razali Zaini

[Appeals from High Court, Kuala Lumpur; Suit No: S1-22-969-2007]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] This appeal is brought against the decision of High Court of Kuala Lumpur whereby it granted an injunction restraining the first defendant from selling or disposing of the property in question to the second defendant. We must begin by stating that there are two appeals before us. They are Civil Appeal No. W-02-665-2007 and Civil Appeal No. W-02-1147-2007. Yesterday, we had before us an application in Civil Appeal No. W-02-665-2007 to extend time to file the record of appeal. In view of the fact that this is an interlocutory matter and time would be saved if we dealt with the merits of the appeal proper especially having regard to the fact that the second defendant had filed his record of appeal we directed the first defendant (the appellant in W-02-665-2007) to file a further affidavit enclosing all the cause papers placed before High Court in respect of the application for the injunction. This was done. For convenience we refer to Civil Appeal W-02-665-2007 as the first appeal and W-02-1147-2007 as the second appeal.

[3] In the first appeal the primary ground advanced before us is that the learned judge erred in exercising his discretion by failing to take into account certain considerations that were relevant to this case. In order to appreciate the arguments that have been advanced it is necessary to hearken to the facts of this case in brief terms. The plaintiff (the common respondent in both these appeals) is, and was at all material times, the first defendant's tenant. The tenancy agreement which the plaintiff had with the first defendant contains a clause which gave it a right of first refusal in the event that the first defendant intended to sell the property in question. We must now say a word about the subject property.

[4] Sungei Wang Plaza is a large shopping centre in the hub of Kuala Lumpur's commercial district. It has many shop lots. All sorts of goods are transacted and all sorts of services are available there. It is a notorious fact that Sungei Wang Plaza is a favourite shopping centre for Malaysians as well as foreign tourists. The plaintiff's tenancy was in respect of the foyer of two cinemas owned and managed by the first defendant. Eventually the cinemas closed. The first defendant wanted to sell both the foyer and the space occupied by the cinemas. By a letter dated 17 May 2004, it offered the subject property (that is to say the foyer and the cinemas) to the plaintiff at a price of RM16 million. Later, disputes arose as to the respective obligations of the parties with particular regards to para 2(b) of the letter of offer. In essence what that paragraph says is that the sale & purchase agreement between the plaintiff and the first defendant is to be signed within seven days after the owner of the building (Sungei Wang Plaza) has approved the change of use to which the plaintiff proposed to put the subject property after acquiring it. After some correspondence, on 28 December 2005, the first defendant terminated the agreement to sell to the plaintiff on the ground – and we quote from its letter:

> You disregarded the reasonable timeline requested of you in making the application as stipulated in our letter of 5 October 2005 despite your earlier representation that you and/or your advisers are ready, able and willing to apply for the same immediately.

By the same letter, the first defendant sought to return the deposit of RM320,000 which plaintiff had paid.

[5] On 14 August 2007 the plaintiff took out a writ and simultaneously by summons moved for an injunction which was granted on 6 December 2007. That is the order which is the subject matter of complaint before us in this appeal. One of the complaints made by both defendants is that there was inordinate delay by the plaintiff in seeking the injunction. In actual terms, there was a delay of more than 19 months. Now it is a general principle of equity jurisprudence that unreasonable delay in seeking specific relief will entitle a court of equity to decline such relief. *Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1979] 1 LNS 19 provides a ready illustration of the application of the principle. This is because Courts of Equity have acted on the principle that only the vigilant should be aided and not the indolent. This guideline is embodied in the Latin maxim *vigilantibus non dormientibus jura subveniunt*. But like all principles of equity, the circumstances of each case govern the ultimate exercise of discretion. There may be circumstances when it would be positively unjust to refuse relief merely on the ground of delay. And the paramount consideration of a Court of Equity has always been the justice of a given case.

[6] On the facts of the present case, the judge does not appear to have considered the delay to have been such a nature to disentitle the plaintiff to relief. We agree with the exercise of discretion so far as this part of the case is concerned. It would in our view be quite unreasonable to expect the plaintiff as the tenant of first defendant to rush off to court the moment the contract was terminated. It had an ongoing relationship with the first defendant. It is a commercial reality that businessman do not wish to create an antagonist relationship in circumstances where there are negotiations on foot for a transaction. One can therefore readily understand; as the learned judge did; the plaintiff's reluctance to commence action earlier than it did. And it must be said in fairness to the plaintiff that soon after it discovered the sale of the subject property to the second defendant it did move swiftly enough to protect its interests. It therefore follows that nothing turns upon the delay point.

[7] Another ground advanced before us is that the learned judge overlooked the fact that there was nothing special about the subject property. It was submitted that the presumption under s. 11(2) of Specific Relief Act 1950 had been rebutted on the facts here. With respect, we do not agree. As we have already

said, by reason of its location and its popularity with the general public, the building in which the subject property is located itself carries a special value. So must the subject property itself. Indeed we would go so far as to say that having regard to the special circumstances of this case to which we have already adverted, the subject property is indeed of special value. Accordingly, we find no merit in this ground of complaint.

[8] The third and final point raised in support of this appeal is that the learned judge overlooked the fact that the obligation was upon the plaintiff to obtain approval from the owners of the building namely Sungei Wang Plaza Sdn Bhd for the works it intended to carry out. But it must be said that the evidence discloses that the plaintiff did in fact write to the owners. They in turn instructed their solicitors to reply by letter to the first defendant. There is therefore no merit in this ground of complaint as well.

[9] So far as the second defendant is concerned, the allegation that it is a *bona fide* purchaser and is therefore not to be prevented from going ahead with its purchase is a matter that is in serious dispute. There is some evidence to show that the second defendant was in fact aware of the transaction between the plaintiff and the first defendant. In any event, the burden is on the second defendant to prove that it was indeed a *bona fide* purchaser (see *Bhup Narain Singh v. Gokhul Chand Mahton* LR 61 IA 115) and this is a matter that is best left to be resolved at a trial in which *viva voce* evidence is led.

[10] Taking a step back and looking at the facts and circumstances of this case as a whole, we are satisfied that a reasonable tribunal properly directing itself on the law and upon the material before us would have come to the same conclusion as the learned judge at first instance and would have exercised discretion in like manner. We have said on a number of occasions that in an appeal against the exercise of discretion the initial function of this court is one of review only. We do not possess an original discretion of our own. To succeed, an appellant must demonstrate that the discretion has not been exercised by the primary judge as required by law. That burden has plainly not been discharged by the appellant before us.

A **[11]** For the reasons already given, these appeals must fail. They are dismissed. The appellants must pay the costs of this appeal to the respondent. In the special circumstances of this case, we would permit the admission of two separate items of getting up in the respondent's bill of costs: one against each appellant. The
B deposits in court shall be paid out to the respondent to account of its taxed costs. All orders of the High Court are hereby affirmed.

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